

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 12, 2014

CLAIM NO. 201194597

JERE HUGHES

PETITIONER

VS.

APPEAL FROM HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

CITY OF FULTON
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Jere Hughes ("Hughes") appeals from the September 17, 2013, Opinion, Award, and Order and the November 4, 2013, order ruling on the petition for reconsideration of Hon. Edward D. Hays, Administrative Law Judge ("ALJ"). In the September 17, 2013, Opinion, Award, and Order, the ALJ awarded permanent partial disability ("PPD") benefits and medical benefits. On appeal, Hughes

asserts the ALJ failed to set forth sufficient findings of fact regarding his limitations or restrictions resulting from his work injury.

The Form 101 alleges Hughes was injured on December 23, 2008, while in the employ of the City of Fulton Police Department ("CFPD"). Under "body part injured" is the following: "Head, neck, left shoulder, back, and any other condition identified as work-related in the medical records filed into evidence." The injury occurred as follows: "I had two separate falls on ice approximately a couple hours apart."

The June 12, 2013, Benefit Review Conference ("BRC") lists benefits per KRS 342.730 [handwritten: "including multipliers & PTD"] as the contested issue.

Concerning Hughes' impairment rating and entitlement to permanent total disability ("PTD") benefits, the ALJ's findings of fact are as follows:

The ALJ finds that Jere Hughes sustained an 18% permanent impairment to the body as a whole due to the two work-related incidents on December 23, 2008. This impairment rating is supported by the opinions of both Dr. Arendall and Dr. Prince, both of whom were his treating physicians. The ALJ does further find that Plaintiff has a 6% impairment to the body as a whole based upon his left upper extremity condition. This impairment rating is supported by the opinion of Dr.

Ragsdale, the surgeon who performed the shoulder surgery. It should be noted that Dr. Prince has included the upper extremity impairment in her overall 18% impairment rating.

KRS 342.0011(11)(c) defines permanent total disability as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as the result of an injury. Under subparagraph 34 of the same statute, "work" is defined as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy."

In this claim, the ALJ has found the Plaintiff to have an 18% permanent impairment as a result of the work-related injuries. Thus, the permanent impairment requirement for finding permanent total disability is satisfied. The question then becomes whether the Plaintiff has suffered a complete and permanent inability to perform any type of work as defined herein. The Plaintiff has the burden of proof and bears the risk of non-persuasion as to every essential element of the claim. Snawder vs. Stice, 576 S.W. 2d 276 (Ky. App. 1979). The ALJ is aware of the Plaintiff's testimony that he is now drawing Social Security disability benefits. However, this finding of disability is not binding on the ALJ in this workers' compensation claim. The ALJ cannot ignore the fact that Mr. Hughes is an educated, articulate man who is only 50 years of age and who has considerable administrative and public relations experience. He has obtained a Master's Degree and is apparently qualified to be a City Manager. The ALJ recognizes

that Plaintiff does not possess the ability to return to his former job of police officer or Assistant Chief, and this fact is admitted by the Defendant-Employer.

...

Finally, the issue comes down to a determination as to whether the appropriate compensation is an 18% impairment with a 3X multiplier or whether the Plaintiff is permanently totally disabled. In considering total disability, the ALJ must take into consideration the many factors set forth in KRS 342.730; Osborne v. Johnson, 432 S.W. 2d 800 (Ky. 1968); Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000); McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001).

The ALJ must factor in the many variables in determining the question of whether Plaintiff is totally and permanently disabled. In the opinion of the ALJ, Mr. Hughes is still a relatively young man at 50 years of age. He is highly educated and he possesses a Master's Degree. He has substantial skills in administration, supervision, human relations, and municipal-related administration. Although the Plaintiff complains of constant pain, of which fact the ALJ is aware and has considered, the ALJ is skeptical as to the severity of the reports of continued pain and simply is not persuaded that Plaintiff cannot engage in meaningful work activities. The ALJ finds that Plaintiff is capable of obtaining work in the local competitive job market and that he is likely to obtain such employment if there is any incentive for him to do

so. Based on the Plaintiff's obvious intellect, education, prior work experience, and on-the-job training, the ALJ finds that Plaintiff has not sustained his burden of proving permanent total disability.

In his October 1, 2013, petition for reconsideration, Hughes requested additional findings as to the restrictions the ALJ concluded Hughes retains as a result of the work injury.

In the November 4, 2013, order on petition for reconsideration, the ALJ provided the following additional findings:

This claim is before the Administrative Law Judge on Plaintiff's Petition for Reconsideration of the Opinion, Award and Order rendered by the undersigned Administrative Law Judge on September 17, 2013. The Administrative Law Judge has carefully considered the arguments set forth in Plaintiff's Petition for Reconsideration and has further reviewed the response filed by the Defendant, City of Fulton. The Administrative Law Judge found Mr. Hughes to have an 18% permanent impairment to the body as a whole, and the 3X multiplier applicable; however, the Administrative Law Judge did not find the Plaintiff to be totally permanently disabled. The Plaintiff argues that since the Administrative Law Judge found the testimony of Dr. Arendall and Dr. Prince to be the most credible medical evidence and cited said testimony in support of the finding of an 18% permanent impairment, with a 3X multiplier, then the Administrative Law Judge should also

adopt the recommendations of Dr. Arendall and Dr. Prince with respect to the imposition of physical restrictions and limitations. The law in Kentucky is well settled that an Administrative Law Judge may accept a portion of a physician's opinion while rejecting other portions thereof. An Administrative Law Judge may pick and choose from the evidence of a particular witness, accepting some of the evidence but rejecting other parts of the evidence. In this claim, the opinion by Dr. Prince stating that Plaintiff cannot work over 6 hours per day and can only sit for 30 minutes at a time and for 4 hours out of an 8 hour work day is simply not convincing. Dr. Prince has given no factual basis for limiting Plaintiff to 6 hours of work per day. The Administrative Law Judge cannot accept that portion of Dr. Prince's evidence. However, the Administrative Law Judge can also not accept the evidence from Dr. Robert Weiss, who indicated he would not assign any particular restrictions regarding the Plaintiff's conditions in the cervical, thoracic, and lumbar spine, but that he had no opinion with respect to restrictions regarding the shoulder. Having reviewed the evidence in this claim, the Administrative Law Judge defines that the education and job experience of the Plaintiff would enable him to find work on a full time basis which allows him to sit and stand alternately. The Plaintiff has too much education and job experience in the fields of administration and human resources to find that he is totally occupationally disabled.

The Plaintiff has the burden of proof as to every essential element of this claim and the Administrative Law Judge does not find that Plaintiff has

sustained his burden of proving that he cannot perform any type of work under the applicable law. After having fully considered the Plaintiff's petition herein, the Administrative Law Judge does hereby deny and overrule the Petition For Reconsideration.

In his appeal brief, the subtitle of Hughes' "argument" is as follows:

Whether the Administrative Law Judge Failed to Make Essential Findings of Fact and Set Forth Sufficient Evidence to Apprise the Parties of the Basis for His Determination that Mr. Hughes was not Permanently and Totally Occupationally Disabled.

Hughes' argument is as follows:

In ruling on Plaintiff's Petition for Reconsideration, the Administrative Law Judge essentially said that he did not accept the defense evaluator's opinion that there were no restrictions as a result of the work injury. The ALJ further said that he did not accept the 6 hour work day restriction of Dr. Prince. However, the Administrative Law Judge did not set forth what restrictions he found to be appropriate for Mr. Hughes as a result of the work related injury, nor did he set forth what evidence he relied upon for his ruling in this matter. In fact, in ruling on the Petition for Reconsideration, the Administrative Law Judge still did not take into account the physical restrictions placed on Mr. Hughes as a result of his work related injury. The Administrative Law Judge based his determination solely on Mr. Hughes's education and past work experience, without considering the physical restrictions caused by the

work related injury. Certainly, the Administrative Law Judge never set forth the restrictions that he felt were appropriate to be placed on Mr. Hughes as a result of the work injury and what evidence he used to determine those restrictions.

Hughes requests remand for additional findings.

Pursuant to KRS 342.0011(11)(c), "permanent total disability" is defined in pertinent part as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . ." "Work" is defined in KRS 342.0011(34) as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy".

The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store, 34 S.W.3d 48, 51 (Ky. 2000), in determining whether a claimant is permanently and totally disabled:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the

likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

Authority has long acknowledged that in making or rejecting a determination of permanent total disability, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to determine the weight to be afforded the evidence and the inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Mere

evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence to support the ALJ's decision.

The ALJ's analysis pursuant to Ira A. Watson Department Store v. Hamilton, supra, is more than adequate. An ALJ is not obligated to discuss each factor enumerated in Ira A. Watson Department Store, supra, when rendering his findings of fact and conclusions of law. Additionally, the ALJ is not required to set out the minute details of his reasoning in reaching his conclusion. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

In the September 17, 2013, Opinion, Award, and Order, it is evident from the section entitled "Discussion of Relevant Medical Evidence" that the ALJ reviewed and considered the restrictions provided by Dr. Emily Rayes Prince and the lack of restrictions imposed by Dr. Robert Weiss. In the November 4, 2013, order ruling on the petition for reconsideration, the ALJ clearly stated he rejected both physicians' opinions regarding Hughes' physical restrictions or lack thereof. This is well within

the ALJ's discretion. Hughes' argument on appeal appears to be that an adequate analysis of her entitlement to PTD benefits must provide findings as to Hughes' actual restrictions and set out those restrictions in detail. This is not required. In determining whether a claimant is permanently totally disabled, the ALJ is entitled to rely upon other evidence beyond the medical restrictions in applying the criteria of Ira A. Watson Department Store v. Hamilton, supra. In this instance, in the September 17, 2013, Opinion, Award, and Order and the November 4, 2013, order ruling on the petition for reconsideration, the ALJ provided a thorough analysis considering Hughes' age, education, prior employment experience, intellect, and on-the-job training and how these factors relate to the issue of permanent total disability. The ALJ ultimately determined, based on an analysis of these factors, that Hughes' education and job experience primarily prevent him from being permanently totally disabled and he is likely to obtain full-time employment which allows him to "sit and stand alternately."

As the ALJ provided the basis for his determination Hughes is not totally occupationally disabled, the ALJ's findings are adequate and no additional findings were or are necessary.

Accordingly, the September 17, 2013, Opinion, Award, and Order and the November 4, 2013, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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